IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 99 of 2005
With
CIVIL APPLICATION - FOR VACATING STAY No. 1397 of 2005
In APPEAL FROM ORDER No. 99 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

1 & 2 YES; 3 to 5 NO

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CHAIRMAN/SECRETARY BHADRESHWAR CO-OP HOSG. SOC - Appellant(s)

Versus

MAHARAJ SAMOSA CENTRE PROP. BABULAL HARIRAM & 5 - Defendant(s)

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Appearance :
MR JITENDRA M PATEL for Petitioner No(s).: 1.
MR SHITAL R PATEL for Respondent No(s).: 1, 2, 3, 4, 5,6.
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CORAM : HON'BLE MR.JUSTICE D.H.WAGHELA

Date : 10/08/2005

ORAL JUDGMENT

1. This appeal is preferred from the order dated 9.2.2005 below the applications (Notice of Motions) Exhs.6-7 and 22 in the Civil Suit No.2472 of

2004 pending in the City Civil Court, Ahmedabad. After initial order dated 13.9.2004 to maintain status quo in regard to the 'suit wall', the applications Exhs.6-7 of the present appellant is dismissed and the ad-interim relief is vacated with an order, pursuant to the respondents' application Exh.22, to the appellant to demolish the suit wall at their own cost within three months.

2. Challenging the aforesaid order, it is contended on behalf of the appellant that admittedly the appellant is the owner of the housing society and the compound wall that existed around the buildings of the society has to be protected and could not be ordered to be demolished at the instance of the occupants of certain shops. It was the case of the appellant that the wall that existed had been demolished on 4.9.2004 and after the resolution dated 6.9.2004 of the appellant, the wall was newly constructed so as to protect the members of the society from external nuisance. It is apparent from the record that the appellant approached the City Civil Court immediately after construction of the

wall and obtained the interim order to maintain status quo which operated till the impugned order, after hearing the respondents, was passed. It may be important to note at the outset that the main suit itself is filed with the sole prayer of permanent injunction against demolition of the compound wall by the respondents. Therefore, it is all but an admitted fact that the suit has been instituted and interim relief was prayed for protection of the wall which was constructed immediately before filing of the suit and the issues of legality or otherwise of construction of the wall are left to be raised by the other side while the wall would stand.

3. According to the defence of the respondents, and as found by the trial Court in the impugned judgment, the defendants have been in possession of the shops abutting the road since the years 2000 to 2002 and the wall constructed between the road and the shops can only cause hindrance to the owners of the shops. Under apprehension of construction of such a wall by the appellant, the respondents had filed a caveat application dated 3.9.2004 and the

initial ad-interim order to maintain status quo was passed in the face of that caveat application without affording to the respondents an opportunity of being heard. The appellant had apparently not pointed out filing of the caveat by the respondents and the Court has taken a serious view of suppression of that fact. Having regard to the contentions raised and the documents relied upon by the respondents, particularly the resolution dated 2.11.2000 signifying sale of the whole flat in which the shops of the respondents were made, the Court has reached the *prima facie* conclusion that not only the compound wall was demolished with the permission of the appellant but the land which was left open thereby was permitted to be used under that resolution which was purported to have been signed by the secretary and the president of the appellant society. Thereafter, the respondents appeared to have enjoyed free access to their premises directly from the road and the wall in question coming up for the first time after four years of the aforesaid resolution could only cause loss and damage to the respondents in their business and access to their premises. It was

in such circumstances that the learned Chamber Judge of the City Civil Court has observed in the impugned judgment that: *"The defendants cannot be compelled to tolerate such loss till the final decision of the suit. On the one hand, if the demolition of the reconstructed wall is hereby ordered, the plaintiffs are not likely to suffer any immediate threat by external elements from nuisance makers. Thus, on balance analysis of the comparative difficulties, I am required to order for mandatory injunction so that the real justice can be meted out to the parties".* The learned Judge has relied upon the judgment of the Supreme Court in **SAMIR SANYAL v. TRACK TRADE (1996) 4 SCC 144** in support of the impugned order.

4. It being absolutely clear that the wall in question was constructed by the appellant immediately before filing of the suit and, four years before that, the same society had permitted demolition of the wall by a resolution which is purported to have been signed by the secretary and the president and it having been produced before the Court, the appellant appears to have come up with further evidence before this Court in the form of affidavit of the then

secretary Mr.Janakbhai H.Vyas who has stated that he was conversant with the present dispute between the society and the respondents, that he was shown the resolution of the society dated 2.11.2000 which is produced on record and after perusing the same he has stated on oath that: *"The said resolution has not been passed by the society on 2.11.2000 purporting the transfer of land around the flat of Jasodaben and the society has never permitted said Jasodaben to demolish the compound wall and said land was never sold to her".* He has further stated on oath that: *"The said resolution is concocted and bogus and it was not passed by the society nor it was signed by me. I say that this resolution is also not on the letter-head of the applicant society. I have verified the original minute book of the society of Managing Committee and General Body of the society but in November, 2003 or round about, there was no such resolution in the minute book of the society was made".* Learned counsel Mr.Shital Patel, appearing for the respondents, sought to produce a number of documents of the appellant society upon which signature of the same secretary in the same form as is found in the aforesaid resolution dated 2.11.2000

was to be found. It was, on that basis, submitted that the subsequent affidavit and the statement on oath before this Court was a daring attempt at misleading the Court by stating lies on oath.

5. At one stage, while arguing the appeal, learned counsel Mr.Jitendra M.Patel, argued that, immediately before reconstruction of the wall in September, 2004, a wall had existed and due to its demolition by the respondents, reconstruction of the wall was required to only restore the position. In support of that submission, he produced certain photographs in which it was found that the photographs were taken as late as on 11.2.2005. Thus, the pictures of demolition which were sought to be used for canvassing demolition prior to 3.9.2004 showed even demolition subsequent to 9.2.2005, the date of the impugned order. Mr.Patel immediately withdrew the photographs and produced for perusal of the Court the application dated 15.2.2005 of the appellant complaining about demolition by the respondents of the wall on 9.2.2005. That application appears to have been made in the trial Court in the

main suit and annexed therewith is the complaint made to the Police Inspector, Naranpura Police Station. Upon further queries about existence of the wall, the learned counsel had the audacity to submit that the wall which was demolished after the impugned order has again been immediately reconstructed and, therefore, the present appeal from the impugned order was practically meaningless and infructuous. That was submitted after suppression and revelation by the appellant of the fact of the subsequent demolition and reconstruction of the wall and after the arguments addressed for over four hours on merits.

6. On the legal aspects of the matter, learned counsel Mr.Jitendra M.Patel submitted that, as on the date of the suit, existence of the wall was a matter of *"settled position"* and it ought not to have been disturbed by the impugned order directing demolition of it. The learned counsel relied upon the judgment of the Supreme Court in **RAME GOWDA v. M.VARADAPPA NAIDU [(2004) 1 SCC 769]** in support of that submission. It was also submitted that if the

suit wall were to be demolished by a mandatory injunction, the appellant was directly non-suited because the very purpose of filing the suit was to protect the wall. Relying upon the judgment of the ANDHRA PRADESH HIGH COURT in **JIVAJI SAMNAMURHY v. CHERUKUMALLI SRINIVASA RAO [1988 (1) Current Civil Cases 660],** it was also submitted that: *"Unless it was a case of a counter claim or set-off, defendant was not entitled to any relief against the plaintiff in the main suit and that the defendant cannot invoke the inherent powers of the Court under Section 151 of the C.P.C. for getting a temporary injunction against the plaintiff in the circumstances other than those covered by clause (a) of Rule 1 Order 39, C.P.C.".* The learned counsel relied upon the following observations of the Kerala High Court in **KARTHIYAYANI AMMA v. GOVINDAN [AIR 1980 Kerala 224]:**

> *"7. The ultimate position, therefore, reduces itself to this: Can a person in possession without title sustain a suit for injunction against the rightful owner if he proves possession? Yes. In this case, plaintiff is found to be in possession. On the finding, he should be granted the injunction prayed for. A*

> *person in possession can be evicted only in due process of law. Even the rightful owner cannot eject him with force. If he cannot be evicted with force, he continues to be in possession and he can resist invasion of his possession by everyone including the rightful owner. If the rightful owner threatens his peaceful possession, he can approach Courts of Law and pray for the equitable relief of injunction to protect his possession".*

The learned counsel also relied upon several judgments of various High Courts based on the judgment of the Supreme Court in **DORAB CAWASJI WARDEN v. COOMI SORAB WARDEN [(1990) 2 SCC 117],** which was also relied upon on behalf of the respondents. According to that judgment, where the question for consideration was whether the appellant was entitled to the injunction in a mandatory form directing purchaser-respondent to vacate the premises, it was held that, in the circumstances, it was but just and necessary that a direction should go to the respondents to undo what they had done with knowledge of the appellant's rights. It is observed by the Hon'ble Supreme Court that the relief of interlocutory mandatory injunctions are granted generally to preserve or restore the status quo of the last non-contested status which preceded the

pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. It is also observed that since the relief of an interim injunction is all the same an equitable relief, the Court shall also consider whether the comparative mischief or inconvenience which is likely to ensue from withholding the injunction will be greater than that which is likely to arise from granting it, which means that the balance of convenience is in favour of the plaintiff seeking the relief.

7. The learned counsel for the respondents has also relied upon the judgment of this Court in **HINDUSTAN ENGINEERING & CONSTRUCTION CO., AHMEDABAD v. KALINI CO-OP. HOUSING SOCIETY LTD. [1992 (1) G.L.R. 261]** wherein it is held that, in case where facts are found to be of exceptional nature, it cannot be said that the Court has no jurisdiction at all to grant an interim mandatory relief in favour of a defendant upon such defendant's interlocutory

application in the plaintiff's suit in an appropriate case. And in the other judgment of this Court in **JIVANBHAI JERAMBHAI PATADIA v. BHAVANJEE VINASJEE THAKKAR [AIR 1995 Gujarat 92],** it is observed that: *"It is very easy for the opponent in any case to deny the status of one party who goes to Court after doing illegal acts and then to contend that no final relief be granted at an interlocutory stage. The Court in such situation cannot sit and watch the proceedings as a silent spectator and show its helplessness".* The judgment of the Patna High Court in **SMT. INDRAWATI DEVI v. BULU GHOSH [AIR 1990 Patna 1]** was also relied upon for the proposition that in the facts where musclemen have forcibly evicted the tenants in the suit premises, even while the suit was pending before a court of competent jurisdiction, the situation that arose was peculiar and of exceptional nature. It was held that the Court was right in granting, in exercise of its inherent powers, a mandatory injunction in favour of the tenant and against the landlord directing the landlord to vacate the premises in question and put the tenant in possession thereof.

8. Applying the above salutary principles regarding grant of mandatory interim relief in the facts of this case, it was apparent that, *prima facie*, the respondents were enjoying the possession of their shops and access to the road at least since last four years before the wall was constructed between their shops and the road and ad-interim injunction was obtained without disclosing the fact of filing of caveat by them. If the document dated 2.11.2000 signifying transfer of the premises and permission by the appellant to demolish the wall were believed, the respondents were, *prima facie,* in enjoyment of a right so essential to the conduct of their business. Since that document was stated to be "*bogus*" by filing of the affidavit in this Court of one of the signatories, namely, Mr.Janakbhai H.Desai, the then secretary of the appellant society, the appellant was called upon to clarify, by keeping him present, the stand that he himself was taking. Mr.Desai remained present in the Court and after admitting his signatures on some of the documents, including the receipts issued in 2002 on which there

appeared similar signatures in Gujarati, he requested to allow him to withdraw the affidavit and be relieved of any penal liability that may arise out of investigation that may be ordered due to serious doubts about the statements made on oath before this Court. Thus, in short, at least at this stage, the *prima facie* case of the appellant of wrongful possession and enjoyment of the premises by the respondents is found to be not only weak but their own attitude and activity of constructing and reconstructing the wall and seeking to obtain interim injunctions appears to be high-handed, lawless and calculated to abuse the process of Court. Seeing that in light of the allegations of huge demands of money from the respondents to allow them access to road as before would create the impression of black-mail for the success of which marathon arguments were addressed in the Court at the cost of hearing of other cases in which the parties may be suffering genuine injustice for decades.

9. On the other hand, learned counsel Mr.Shital Patel, appearing for the respondents, made a

statement on their behalf that the respondents shall have no objection to the main suit being heard and disposed as early as practicable and to filing an undertaking that the respondents shall reconstruct the wall in case the trial Court comes to the conclusion that the original suit wall constructed by the appellant was required to be protected, in the facts and circumstances of the case. Thus, in short, the balance of convenience was, and is, in favour of the respondents insofar as the wall can be restored at the expense of the respondents and, in case it is allowed to stand, the business of the respondents would suffer and they could be put to such loss as may not be easily calculated or compensated. The larger issues of the legality of possession of the respondents and commercial use by them of the premises can be decided only after taking evidence at the trial and only if such issues are arising in the main suit. The point, however, which requires particular notice is that, *prima facie,* as it is recorded in the impugned judgment, the litigation has been initiated and carried on by the appellant with

an ulterior motive and after involving the police also and with *"marathon arguments"* it appears to have taken considerable time of the trial Court as well as this Court. When it came to testing the veracity of the affidavit of the secretary, which was filed in this Court as an additional evidence, the deponent and the learned counsel for the appellant have insisted on taking no further action and allowing them to simply withdraw that affidavit. That shows the seriousness with which the proceedings are carried on for continuing the ex-parte interim injunction even after admittedly reconstructing the wall which only serves the immediate purpose of causing loss to the respondents. Neither the attitude of the deponent who filed an affidavit before this Court as an additional evidence nor the tactics of the appellant in attempting to continue the ex-parte interim injunction can be appreciated or approved. It clearly appears that litigations have been thrusted upon the respondents and they have been made to suffer the agony of litigating with urgency since 13.9.2004 despite their caveat. It may

be apposite to quote the observations in paragraph 6 of the judgment of the Supreme Court in **SAMIR SANYAL v. TRACK TRADE [(1996) 4 SCC 144]:-**

> *"6. .....we find that high-handed action taken by respondents 1, 3 and 6 in having the appellant dispossessed without due process of law, cannot be overlooked nor condoned. The court cannot blink at their unlawful conduct to dispossess the appellant from the demised property and would say that the status quo be maintained. If the court gives acceptance to such high-handed action, there will be no respect for rule of law and unlawful elements would take hold of the due process of law for ransom and it would be a field day for anarchy. Due process of law would be put to ridicule in the estimate of the law-abiding citizens and rule of law would remain a mortuary."*

The loss suffered by the respondents cannot be assessed at this stage and cannot be the subject-matter at present for award of any compensation, but this Court would be failing in its duty of doing justice if the respondents are not even awarded costs of this litigation. However, in view of the pendency of the suit where evidence is yet to be recorded in respect of the documents relied upon by the parties and in view of the urgent request not to initiate any actions against the deponent, no further

orders are passed in respect of the enquiry into the affidavit filed by the then secretary of the society. Needless to clarify that the conclusions drawn and the observations made in this judgment are based on *prima facie* examination of the material on record and for the purpose of deciding the issue of interim relief; and, therefore, the trial Court shall proceed with the main suit in accordance with law without being influenced by the observations made herein.

10. Accordingly, the appeal is disposed with the necessary direction, modifying the impugned order to the extent that the respondents shall demolish the wall in question after filing an undertaking in the trial Court stating that, in case it is held that the wall was required to be protected at the time of filing of the suit, the respondents shall reconstruct the wall at the same place and of the same length, width, hight and strength within two months of the order of the trial Court. The appellant shall pay to each of the respondents a sum of Rs.5,000/- (rupees five thousand) by way of costs. The civil application

stands disposed as rejected in view of the above order and Rule issued therein is discharged with no order as to costs.

11. A request was made by the learned counsel for the appellant to stay the operation of this order for a period of four weeks. There being no justification for granting such request, it is rejected.

Sd/-

(D.H.WAGHELA, J.)

(KMG Thilake)